GREENVILLE PACKING CO., INC. v. DAN GLICKMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND CATHERINE WOTEKI, UNDER SECRETARY OF AGRICULTURE FOR FOOD SAFETY.
No. 00-CV-1054.
Filed September 5, 2001.

FMIA--PPIA –- APA – Bribery of Federal Official – Arbitrary and Capricious, basis for claim – Due process, timely notice of adverse facts to be asserted – Mitigating circumstances – Inspection services, fitness for, by USDA – Evidence, admissibility generally – Subsequent acts, relevance to penalty imposed – *Per se* bribery offenses, imposition of penalties for – Bifurcated hearings in penalty phase – Indefinite term, denial of inspections services for, not unconstitutional – Penalty expert, use of, not arbitrary – Transfer in lieu of dismissal, improper subject matter jurisdiction, balance of equities.

Appellant, a slaughterhouse, was indefinitely suspended from receiving federal meat inspection services by an Administrative Law Judge (ALJ). At the hearing, evidence of prior conviction of bribery of a federal meat inspector was introduced. Using the *per se* violation rule adopted in *Windy City Meat Co., Inc*., 926 F.2d 672 (7th Cir. 1991), the ALJ made a determination that the Appellant was unfit to receive USDA inspection services and then moved to the penalty phase of the hearing. During the penalty phase of the hearing, the Appellant introduced evidence of mitigating circumstances, whereupon the ALJ received evidence of 78 Process Deficiency Reviews (PDR's). Appellant initially appealed the ALJ's decision before the Judicial Officer (JO). The JO affirmed the ALJ's decision. The court determined that the ALJ had properly considered both mitigating and aggravating factors before setting an indefinite term of suspension of inspection services. Appellant raised due process issues relating to failure to give notice of raising of derogatory evidence. A portion of the case under PPIA was transferred to the U.S. District Court, rather than dismissal, based upon a balance of equities under *Liriano v. United States*, 95 F.3d 119, 121 (2d Cir. 1996).

United States District Court
Northern District of New York

MEMORANDUM
DECISION & ORDER

McAvoy, D.J.:

This is an appeal from an administrative proceeding pursuant to the Federal Meat Inspection Act, 21 U.S.C. §§ 601 *et seq*. (FMIA), and the Poultry Products Inspection Act, 21 U.S.C. §§ 451 *et seq*. (PPIA). A decision dated June 1, 2000, was issued by the Judicial Officer (JO) of the Department of Agriculture, William G. Jenson, affirming the decision of Administrative Law Judge (ALJ) Dorothea A. Baker dated March 13, 2000. Those decisions indefinitely suspended the right of Greenville Packing Co., Inc. (Greenville) to receive federal inspection services as required by the FMIA and the PPIA. Greenville appeals that determination, asserting that the indefinite suspension is an abuse of discretion and that the ALJ made several errors in the admission of evidence that

warrant reversal.

I. Background

The facts of this case are not in dispute. Greenville is a slaughtering house. (ALJ Finding of Facts ¶ 2). Greenville has for some time been operating under the direction of Robert Mattick (Mattick). *Id.* ¶ 5. Prior to the events leading to this action, Greenville was the recipient of United States Department of Agriculture (USDA) inspection services. *Id.* ¶ 4. Starting in August 1993, Randall Barber (Barber) was assigned as the permanent inspector to the Greenville plant. *Id.* ¶ 7. Some time in January 1995, the plant was having difficulty getting the necessary veterinary inspections on time. *Id.* ¶ 32. Barber approached Mattick and suggested that he be paid a certain amount to certify the cows ready for slaughter without the required inspections. *Id.* Thereafter, for a two year period from January 1995 to January 1997, Mattick paid bribes to inspector Barber. ¶ 31. In return, Barber allowed Greenville to slaughter animals that had not been properly inspected or not inspected all. ¶ 20, 24, Greenville was permitted to certify these animals as inspected by the USDA, and thus, fit for human consumption, even though no actual inspection had taken place. ¶ 33. In 1997, a surprise inspection by Barber's supervisor revealed what had been happening. ¶ 28-30. Criminal charges were subsequently brought, and Greenville plead guilty to felony bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A). ¶ 8-9. The USDA subsequently brought an action pursuant to 21 U.S.C. § 671 and 21 U.S.C. § 467(a) to indefinitely withdraw meat and poultry inspection services from Greenville for its felony conviction. ALJ Prelim. Stat. By Decision and Order dated March 13, 2000, the ALJ granted the USDA's petition for withdrawal of services. An appeal to the JO of the USDA affirmed the decision. Plaintiff now brings this action as an appeal of those determinations.

II. Discussion

A. The Request to Transfer the Poultry Claim

As a preliminary matter, this Court does not have subject matter jurisdiction over that portion of Greenville's appeal relating to the Poultry Products Inspection Act (PPIA). Appeals from the determination of a JO regarding PPIA claims are properly before the Circuit Court of Appeals, rather than the District Court. 21 U.S.C. § 467(c). Plaintiff acknowledges this error, and requests this Court to transfer that portion of its claim to the Second Circuit pursuant to 28 U.S.C. § 1631. That statute provides in part:

> Whenever a civil action is filed in a court . . . including a petition for review of administrative action and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed.

When considering whether a transfer is appropriate, the Court should carefully weigh the equities between a transfer and a dismissal. *Liriano v. United States*, 95 F.3d 119, 121 (2d Cir. 1996). Where a new action would be time barred, and the original action was filed in good faith, a transfer is appropriate. *Liriano*, 95 F.3d at 121; *Ranchi v. Manbeck*, 947 F.2d 631, 633 (2d Cir. 1991).

Here, as Plaintiff points out, should the court dismiss this portion of the action, no appeal could be taken because it would now be time barred. Additionally, Plaintiff points to the potential for confusion caused by having decisions under the PPIA appealed to the Circuit Court, but decisions under the FMIA appealed to the District Court. In this case, the equities weigh in favor of a transfer. Plaintiff made a good faith effort to ascertain the court in which the appeal was to be filed. Plaintiff's error was merely inadvertent. Moreover, the prejudice to Plaintiff should this Court decide not to transfer the appeal would be great. Plaintiff would be left with no ability to appeal the adverse administrative determination. Defendants in this action will not be adversely affected by this decision, as they will also have an appropriate forum in which to voice their defense. Thus, the portion of Plaintiff's appeal falling under the PPIA is transferred to the Second Circuit Court of Appeals.

B. Plaintiff's Allegations of Errors in the Admission of Evidence

Plaintiff alleges several errors in the admission of evidence by the ALJ. Review of administrative agency decisions is governed by the arbitrary and capricious standard. Under the Administrative Procedures Act, the Court may only set aside a decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In order to be arbitrary and capricious, there must be a clear indication that an agency determination "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Soler v. G & U, Inc.*, 833 F.2d 1104, 1107 (2d Cir. 1987) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Connecticut Department of Public Utility Control v. Federal Trade Commission*, 78 F.3d 842, 849 (2d Cir. 1996) (citations omitted). The Court may not substitute its judgment for that of the

agency. *Soler*, 833 F.2d at 1107.

1. Admission of the Process Deficiency Reports (PDR)

Plaintiff first alleges that it was error for the ALJ to have admitted eighty-eight PDRs showing the non-compliance of Greenville subsequent to the conviction. Plaintiff points out that the complaint was brought solely on the grounds of the felony conviction, and thus, the PDRs should not have been introduced. Plaintiff makes two arguments here. First, Plaintiff asserts he was denied due process by the introduction of the reports, and second, that the reports were not relevant to the proceeding.

Plaintiff's Due Process claim

Plaintiff bases his due process claim on Administrative Procedures Act (APA) 5 U.S.C. § 554(b)(3). That section sets out the requirements for the notice to be given when an administrative agency holds a hearing. It provides in part: "Persons entitled to notice of agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted." Plaintiff asserts that he was denied due process because the complaint by the agency only alleged the felony conviction as a basis for withdrawal of inspection services. Thus, Greenville was not adequately apprised of the facts and law of the claims that it would be called to defend. Pltf. Mem. L. 12-13. Defendant responds that the PDRs were admitted only after Plaintiff sought to have mitigating circumstances considered, and that where mitigating circumstances are considered, "relevant aggravating circumstances" may also be considered. Def. Mem. L. 13 (citing *In re William Stewart*, 50 Agric. Dec. 511, 519 (1991), *aff'd* 947 F.2d 937 (3d Cir. 1991)).

The procedures instituted by the Department of Agriculture require that "[a] complaint . . . shall state briefly and clearly . . . the allegations of fact and provisions of law which constitute a basis for the proceeding . . ." 7 C.F.R. § 1.135(a). This provision is almost identical to the APA statute. The standard for determining whether adequate notice was given is whether the parties were aware of the issues "actually at stake" in the litigation and whether these issues were fully litigated before the ALJ. *ITT Continental Baking Co., Inc. v. Federal Trade Commission*, 532 F.2d 207, 215 (2d Cir. 1976) (citations omitted). Plaintiff was not deprived of due process here. There was adequate notice that the defendant would seek to introduce the PDRs, as the defendant gave plaintiff that information four months in advance. Def. Mem. L. 13. Further, the record is replete with discussions of the PDRs, Plaintiff's attacks on the PDRs, and the ALJ's understanding as to the issues surrounding the PDRs. Plaintiff had opportunity to demonstrate that a new program was going into effect, and that the non-compliance was in part due to that new program. Admin. Rec. 254-55.

Finally, the use of the PDRs did not change the issue or the legal argument in the proceeding before the ALJ. Plaintiff was on notice that its fitness to receive meat packing services was the issue the ALJ would be deciding at the hearing. The PDRs did not in any way change that focus. *Cf. National Labor Relations Board v. Local Union No. 25*, 586 F.2d 959, 960 (2d Cir. 1978) (where there was no opportunity to brief the issue, no evidence on the issue was presented during the proceeding, and legal issue was separate and not disclosed prior to the proceeding, reversal warranted).

Relevance of the PDRs

Plaintiff next argues that the reports should not have been admitted because they are not relevant. The procedural rules for USDA hearings provide: "[e]vidence which is immaterial, irrelevant, or unduly repetitious . . . shall be excluded insofar as practicable." 7 C.F.R. § 1.141(b)(1)(iv). Relevant evidence is defined under the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EV. 401.

The purpose of the act allowing the suspension of inspection services is to protect the public by preventing persons or companies who are unfit from introducing meat into the stream of commerce. *See* ALJ Decision 17 (quoting the Congressional findings in passing the FMIA). Thus, the issue before the ALJ was the fitness of a party to receive meat inspections under the circumstances. Any evidence tending to establish that a party was or was not fit to receive inspection would, therefore, have been relevant.

Plaintiff does not dispute that subsequent *compliance* with the FMIA is a relevant factor in determining the fitness of a party to receive meat packing inspections. *See Wyszynski Provision Co., Inc. v. Secretary of Agriculture*, 538 F. Supp. 361, 364 (E.D. Penn. 1982). Thus, a *lack* of subsequent compliance is also relevant. It would appear that Plaintiff, in arguing against the admission of the PDRs, would limit the USDA to introducing evidence of the conviction, but would allow the defendant in such a proceeding to introduce any favorable evidence it wanted. Plaintiff cannot have it both ways. Either the conviction alone should be considered in determining whether a defendant is fit to receive inspection, or all of the circumstances and situation surrounding the denial of inspection services should be considered, whether they are favorable or unfavorable. This Court finds that the latter approach is the more logical one. It takes into consideration that sometimes a conviction alone will not be enough to deny services. *See Chernin v. Lyng*, 874 F.2d 501, 504 (8th Cir. 1989). Further, the behavior of the convicted party subsequent to his conviction might be even more relevant in some cases than the conviction itself. This is consistent with

other decisions that have considered the subsequent compliance or lack of compliance of a party in determining the fitness of a party to receive inspection. *See In re: William Stewart*, 50 Agric. Dec. 511, 519 (1991) *aff'd* 947 F.2d 937 (3d Cir. 1991); *In re: H. Smith Packing Co. & Louis V. Smith*, 52 Agric. Dec. 1025, 1030 (1993). Thus, the Court cannot find that the ALJ acted in an arbitrary and capricious manner when allowing the PDRs to be introduced.

2. Error in admitting the Federal Register-the *per se* policy

Plaintiff alleges that it was error for the ALJ to have admitted a portion of the Federal Register containing the USDA policy with regard to persons or organizations that bribe an inspector. Pl. Mem. L. 15. Plaintiff alleges that the policy has been ruled illegal by the courts and that its introduction overshadowed the entire proceeding. Pl. Mem. L. 16.

The *per se* policy has been a source of great controversy and tension between the Department of Agriculture and the Federal Courts. *See Utica Packing Co. v. Block*, 781 F.2d 71, 73 (6th Cir. 1985). The Federal Register statement in question details the Department of Agriculture's policy with regard to felony convictions for bribery. It states in part:

> The policy of FSQS[1] in administrative actions brought for the withdrawal or denial of Federal inspection . . . based upon convictions for bribery and related offenses, shall be as follows: FSQS shall institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection . . . services when the department's action is based upon a criminal conviction or convictions for bribery or related offenses.

See Administrative Record, Gov. Ex. 11, 44 Fed. Reg. 124 (June 26, 1979). Prior to the unpublished Sixth Circuit decision in *Utica Packing Co.*, 705 F.2d 460 (6th Cir. 1982) (Table), this policy was used as the basis for all Department judicial decisions. Thus, a felony conviction meant a *per se* withdrawal of inspection services. In *Utica Packing Co.*, the Sixth Circuit found that such a *per se* approach rendered a hearing as required by 21 U.S.C. § 671 meaningless. *See Utica Packing Co. v. Block*, 781 F.2d at 73 (discussing the prior unpublished decision). Since that time, the Department's ALJs and JOs have made alternative holdings, one under the *per se* policy and one considering mitigating circumstances. *See, e.g.*, *Windy City Meat Co., Inc. v. United States Department of Agriculture*, 926 F.2d 672 (7th Cir. 1991) .

That is precisely what has occurred here. The ALJ made a holding under the

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[1]FSQS is the abbreviation for Food Quality and Inspection Service. It has been replaced by a successor organization, the Food Safety and Inspection Service (FSIS). ALJ Dec. 26.

per se rule, then also made a ruling after considering the relevant mitigating circumstances. Plaintiff contends that the mitigating circumstances were not really considered because the ALJ allowed the Federal Register to be introduced into evidence.

First, it is notable that the policy of the FSIS in bringing a petition for indefinite denial of inspection services has never been found to be unconstitutional. What various courts have rejected is the insistence by the Judicial Officers of the USDA that ALJs apply the *per se* policy in their determinations of FSIS petitions. *See, e.g.*, *Windy City Meat, Co.*, 926 F.2d at 673; *Utica Packing Co.*, 781 F.2d at 73. Thus, the FSIS policy, as it applies to notify the meat packing industry of the actions FSIS will take when an establishment or person is convicted of bribery, is not illegal or unconstitutional.

Plaintiff points to the ALJ's comments during the hearing to justify its position that the ALJ "felt duty bound" to follow the *per se* policy. Pl. Mem. L. 16. In particular, Plaintiff criticizes the following statement:

> And in view of the fact that, for instance, there is an indication that this indefinite suspension may last a long, long time in view of the statements made by the parties, one can never know-and I don't say this with any anticipation, but one can never know when there might be a change in policy or a change in approach or a change in personnel where there could be some different view taken of this matter.

Pl. Mem. L. 16 (quoting Admin. Rec. 269). What Plaintiff fails to give this statement is a context. At the time the statement was made, Plaintiff was attempting to have various letters of support written by the community introduced for consideration by the ALJ as mitigating circumstances. Thus, the ALJ's statements were an explanation of why she was allowing the unsworn statements to become a part of the record. Taking the record and decision of the ALJ as a whole, there is no indication that the admission of the *per se* policy overshadowed her decision making.

In fact, it appears that the ALJ was admitting the Federal Register document for the purposes of showing notice of the potential for severe consequences for bribery. When she overruled Plaintiff's initial objection, she did so stating, "it indicates the policy of the Food Safety Inspection Service with respect . . . to whether or not a complaint should be filed . . ." Admin. Rec. 221. Subsequent testimony indicated that the purpose of publishing the policy was to "get into the public domain as to what the agency's position was with regard to filing complaints to either withdraw/deny inspection services from persons, firms or corporations that may have been convicted of a bribery." Admin. Rec. 222. In addition, while Mr. Mattick was being questioned, the ALJ asked him about his education and whether he could read and understand the various regulations.

Admin. Rec. 262. Whether Mr. Mattick knew or should of known that he risked withdrawal of inspection services for the bribery was relevant to the ALJ's determination. This is particularly true as Mr. Mattick has maintained throughout that he felt compelled to give the bribe, and did not believe that Inspector Barber's supervisors would have helped him. Admin. Rec. 259-61. Thus, Mr. Mattick's notice of the risk he was taking was relevant in weighing the reasonableness of his decision to continue bribing Inspector Barber rather than report Barber.

Additionally, there is nothing to indicate the ALJ followed a strictly *per se* approach to her determination of fitness. There were numerous findings by the ALJ that could have supported her decision that Greenville was unfit to receive inspection. (ALJ Dec. 19). The ALJ considered the compliance of Plaintiff outside of the bribery (ALJ Finding of Fact ¶ 6; Decision 15-16, 23). She considered the fact that Mr. Mattick was not initially forthcoming about the bribery when Dr. White, the inspection supervisor, visited the plant. Findings ¶ 28. She considered the reasonableness of Plaintiff's claim that it was not possible to report the misconduct of inspectors in light of both the potentially severe consequences for not reporting bribery and the FSIS campaign to make reporting such abuses easier. (ALJ Discussion 14, 25). Even though the ALJ credited Mattick's testimony as to his belief, she went on to find that it was not a reasonable belief to have held. (*Id.* 25). She considered the seriousness of the threat to the public health and safety posed by Greenville's failure to receive inspection services. (*Id.* 21-23). Finally, she considered the seriousness of the charge of bribery. (*Id.* 18-19).

21 U.S.C. § 671 allows an ALJ to indefinitely suspend meat inspection services even when the sole reason for the suspension is a felony conviction. In this case, the ALJ could have concluded that the mitigating factors did not "overpower the risk to the public" of allowing Greenville to continue operating. *Windy City Meat Co.*, 926 at 678. Particularly in light of the many factors she found to be aggravating circumstances, this decision was not arbitrary. Thus, the decision of the ALJ in admitting the Federal Register policy into evidence was not an abuse of discretion. Further, the decision of the ALJ in finding Greenville unfit was not arbitrary or capricious.

3. Plaintiff's Other Claims of Error

In its complaint, Plaintiff also alleges error by the ALJ in allowing the USDA to introduce evidence that contradicted its own inspector as to whether sick animals had been allowed into the stream of commerce. Compl. ¶ 89. Plaintiff does not elaborate on this allegation in its motion papers. This Court has reviewed the Administrative Record and cannot determine what it is that Plaintiff is alleging to be error. Thus, the Court cannot make a finding that the decision

of the ALJ was an abuse of discretion or arbitrary and capricious.

Plaintiff also alleges error in its complaint as to allowing the USDA expert Mr. Van Blargen to testify as to the appropriate sanctions to be given to the Plaintiff. Compl. ¶ 89-90. There is no abuse of discretion here. The ALJ asked for Mr. Van Blargen's opinion of what sanctions he would recommended and why. Admin. Rec. 239. She additionally asked him to specify the circumstances under which the indefinite suspension he was recommending would be lifted. *Id.* 239-40. If the ALJ credited Van Blargen's knowledge of the purposes and history of the FMIA, it would not have been an abuse for her to have asked his opinion as to what sanctions would best serve those purposes. It was then within the discretion of the ALJ to consider the position of the USDA and the purposes behind its policy in fashioning a punishment for Plaintiff. Thus, the ALJ did not act in an arbitrary and capricious manner in considering Van Blargen's testimony when making her decision.

C. Abuse of Discretion to Impose Indefinite Withdrawal

Finally, Plaintiff alleges that the ALJ abused her discretion in issuing a punishment of indefinite withdrawal of inspection services. Plaintiff is correct in his statement that this was "the harshest possible penalty that can be imposed." Plt. Mem. L. 19. That does not, however, mean that it is an abuse of discretion.

In determining the penalty, the ALJ considered the mitigating circumstances presented by the Plaintiff. She noted the settlement offer by the government in the prior criminal proceeding (ALJ Dec. 28). She also considered the potential impact a decision of indefinite withdrawal would have on the business. *Id.* She then considered the severity of the conduct by Greenville. This Court cannot find that her determination that Greenville "has demonstrated a severe lack of integrity" is arbitrary or capricious. *Id.* at 30. As noted by the ALJ, bribery goes to the heart of the FMIA. It is not impossible to imagine that a plant that has previously engaged in such conduct cannot be relied on to act in the best interest of the public health. Moreover, the ALJ decision was in line with other cases indefinitely denying inspection services when the felony conviction involved bribery or the deception of the public about the inspection of meat. *See, e.g.*, *Windy City Meat Co.*, 926 F.2d at 678; *In re: William Stewart*, 50 Agric. Dec. at 518; *In re: Steven's Foods, Inc.*, 40 Agric. Dec. at 1296; *Wyszynski Provision Co., Inc. v. Secretary of Agriculture*, 538 F. Supp. 361, 363-64 (E.D. Penn. 1982); *Toscony Provision Co., Inc. v. Block*, 38 F. Supp. 318, 320 (D.N.J. 1982).

III. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment as to

the FMIA claims is GRANTED. Plaintiff's cross-motion to transfer the PPIA claims to the Second Circuit Court of Appeals is also GRANTED.
IT IS SO ORDERED

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